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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DAVID C. LEMLEY et al., Plaintiffs and Appellants, v. ALISO HOMEOWNERS ASSOCIATION, INC., Defendant and Respondent.	B288789 (Los Angeles County Super. Ct. No. PC057648)

APPEAL from an order of the Superior Court of Los Angeles County, Melvin D. Sandvig, Judge. Affirmed.

Michael P. Rubin & Associates, Michael P. Rubin and S. Martin Keleti for Plaintiffs and Appellants.

Richardson Ober, Matt D. Ober and Jonathan R. Davis for Defendant and Respondent.

Plaintiffs appeal from a postjudgment order granting contractual attorney fees (Civ. Code, § 1717)[1] to the defendant homeowners' association. Plaintiffs contend that they were the prevailing party in their action for specific performance and declaratory relief under the catalyst theory because their complaint caused the association to change its position. We conclude that the trial court did not abuse its discretion. The position the association changed was not the primary relief plaintiffs sought in the lawsuit. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs David C. Lemley and Dorinda N. Lemley own real property in the City of Los Angeles. Real estate developer, K. Hovnanian at Aliso, LLC (Hovnanian), acquired a large tract of land adjacent to plaintiffs' property to construct a planned community. As a condition for construction approval by the City of Los Angeles, in September 2005, Hovnanian, the City, and plaintiffs signed an agreement creating an easement for a fire road to run from the development across plaintiffs' property to the public street. (The easement agreement.)

The Aliso Homeowners Association, Inc. (the HOA) concedes that once the development was complete, Hovnanian would form the HOA, who would become responsible for maintenance of the easement. The easement agreement provided that the rights and obligations run with both properties and bind plaintiffs and Hovnanian's successors, heirs, and assigns. Section 6 provided that Hovnanian would maintain all easement improvements it constructed or installed until the rights and

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[1] All further statutory references are to the Civil Code unless otherwise noted.

obligations under the easement agreement were assigned to and assumed by the HOA. If the HOA or its successors failed to maintain the easement, plaintiffs or the City of Los Angeles were entitled to recover from Hovnanian all costs incurred to do the maintenance in its stead.

Hovnanian agreed to defend and indemnify plaintiffs for all liability arising out of Hovnanian's negligence or damage to plaintiffs' property in constructing or maintaining the easement, or from Hovnanian's breach of the terms of the easement agreement. That section was enforceable against Hovnanian until the rights and obligations in the easement agreement were assigned to, and assumed by, the HOA.

Finally, the easement agreement provided for attorney fees to the prevailing party "in the event of any action or proceeding brought" under it, but did not define "prevailing party."

Hovnanian had created the HOA by early 2014.

In the fall of 2013, plaintiffs' attorney Michael Rubin wrote to the HOA's attorney Matt Ober stating, "It is my understanding that it is advantageous for all parties to enter into an amendment to the original Easement Agreement based on changed circumstances." The parties proceeded to negotiate language but disagreed about whether an amendment was necessary; whether an amendment constituted a novation; whether any agreement should contain an attorney fees provision; and whether it should provide for an assignment of Hovnanian's rights as required by paragraph 6.

The final draft of the amendment to the easement agreement (the amendment) released Hovnanian from its rights and obligations under the easement agreement and assigned those obligations to the HOA. Signed by plaintiffs, Hovnanian,

and the City of Los Angeles, but not the HOA, the amendment read, in part, "the planned development . . . has been completed, and the [HOA] is prepared to assume the rights, duties, and obligations as set forth in paragraph 6 of the [easement agreement]."

II. The litigation

a. *The original complaint for specific performance of the amendment, the assumption, and the demurrer*

Plaintiffs commenced this lawsuit on March 24, 2017 by filing a complaint in equity. The first cause of action for specific performance alleged that starting in February 2014, plaintiffs requested that the HOA "execute the easement amendment . . . ." The pleading alleged that the HOA breached its legal obligations to assume the duties "under the easement agreement" by refusing and continuing to refuse "to execute the easement amendment."

The second cause of action for declaratory relief alleged there was a dispute between the parties about their respective rights and duties under the "easement agreement, the CC&Rs, and any other written documents between Hovnanian and the HOA." Plaintiffs prayed for a declaration and injunction compelling the HOA to execute the easement amendment.

The HOA demurred. (Code Civ. Proc., § 430.10.)

In connection with its demurrer, the HOA asked the trial court to take judicial notice that on May 12, 2017 it recorded a document assuming the easement agreement. (The assumption.) The undated assumption excluded all duties concerning a gate, and then read, "WHEREAS, the [HOA] understands that [plaintiffs], in exchange for the [HOA's] assumption of Hovnanian's rights and obligations as set forth herein, has

released, and shall release, Hovnanian from any and all obligations under the [easement agreement], and has released and shall release Hovnanian from any and all past duties and obligations of maintenance and construction, and based upon such understanding, the [HOA] hereby assumes said obligations. [¶] NOW THEREFORE, based upon the above, the [HOA] . . . *assumes the rights and obligations of Hovnanian as provided in the 2005 Easement Agreement*." (Italics added.)

The trial court granted the request for judicial notice and sustained the demurrer with 20 days' leave to amend.

b. *The first amended complaint for specific performance of the amendment, the demurrer, and the dismissal*

Plaintiffs believed that the assumption was inadequate because it was unilateral, was not irrevocable, and did not include an attorney fee provision.

Plaintiffs' first amended complaint (FAC) alleged that the amendment "was consistent with and in conformity with the spirit in terms of the Easement Agreement." The pleading alleged that beginning in February 2014, plaintiffs had been asking the HOA to "*execute the Easement Amendment*" and to "confirm [the HOA's] assumption of those duties and obligations." (Italics added.) Acknowledging the HOA's assumption, the FAC alleged that plaintiffs had no adequate legal remedy if the HOA refused to execute the *Easement Amendment* in breach of its legal obligations to assume the duties, rights, and obligations under the easement agreement and Covenant, Conditions, and Restrictions (CC&Rs).

The second cause of action for declaratory relief alleged that an actual controversy existed relating to the rights and duties of the parties because plaintiff contended that the

language of the easement agreement, CC&Rs, and other documents required the HOA to assume the entirety of Hovnanian's rights and obligations, whereas the HOA contended it was not bound by all of Hovnanian's obligations.

The HOA again demurred. In the moving and opposition papers, the parties argued about whether the HOA's assumption embraced all of the rights, duties, and obligations under the easement agreement, and whether the amendment expanded on those duties.

The trial court sustained the demurrer without leave to amend and dismissed the action. The ruling explained that plaintiffs failed to point to anything in the HOA's CC&Rs or the easement agreement that stated the HOA must sign an *amendment* to the easement to transfer the rights and obligations from Hovnanian to the HOA. Moreover, the court stated "Hovnanian's rights and obligations under the 2005 Easement Agreement *have already been transferred* to [the HOA]. The Notice of Assumption recorded on 5/12/17 indicates that [the HOA] assumes *all of Hovnanian's rights and obligations under the 2005 Easement Agreement*. . . . As Hovnanian's successor in interest to the land, [the HOA] *has been assigned the rights and obligations of the 2005 Easement Agreement*." (Italics added.) Therefore, the court ruled, as the assumption had already occurred it rendered moot the declaration plaintiffs sought in the second cause of action. Plaintiffs did not appeal from the ensuing judgment of dismissal and so it is final.

III. The attorney fees motions

The HOA moved for attorney fees pursuant to section 1717. It argued that it was the prevailing party because dismissal of the lawsuit was entered in its favor. The HOA requested

$20,747.50 in fees, consisting of $18,467.50 for the litigation plus $2,280 for the fee motion. The HOA authenticated the motion's supporting documents with the declaration of Jonathan R. Davis who attested to the truth and accuracy of the activities and time spent on the litigation by attorneys Matt Ober, Theodore Dokko, and Davis.

Plaintiffs countered with a motion for the trial court to determine they were the prevailing party under the catalyst theory because, as the HOA acknowledged, it recorded the assumption shortly after plaintiffs filed their complaint. Plaintiffs observed that they achieved the objectives of the litigation and hence were the prevailing party. They sought attorney fees in the amount of $51,460.

The trial court ruled that the HOA was the prevailing party because it was the party in whose favor a judgment of dismissal was entered. The court found that the HOA had not substantially changed its behavior in the manner sought by the litigation so as to make plaintiffs the prevailing party entitling them to recover fees. The court added that plaintiffs continued to prosecute this action after receiving notice of the assumption. The court granted the HOA the amount of fees it requested. Plaintiffs filed their timely appeal.

DISCUSSION

I. Principles of section 1717 and standard of review

"When a contract contains a provision granting either party the right to recover attorney fees in the event of litigation on the contract, . . . section 1717 . . . gives the 'party prevailing on the contract' a right to recover attorney fees. . . ." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 865 (*Hsu*).)

Section 1717 defines the phrase "party prevailing on the contract" as "the party who recovered a greater relief in the action on the contract," and empowers the trial court to determine who is the prevailing party. (§ 1717, subd. (b)(1).) The statute allows "those parties whose litigation success is not fairly disputable to claim attorney fees as a matter of right." (*Hsu*, *supra*, 9 Cal.4th at p. 876.)

The trial court "has broad discretion in determining which party has obtained greater relief on the contract, and we will not disturb such a determination on appeal absent a clear abuse of discretion." (*In re Tobacco Cases I* (2013) 216 Cal.App.4th 570, 578.) " ' "Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." ' " (*Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 449.)

II. Plaintiffs are not the prevailing party.

The HOA achieved dismissal of the action after the trial court sustained its demurrer to the FAC without leave to amend. This makes the HOA the prevailing party. When a party obtains a simple, unqualified victory by completely prevailing on or defeating all contract claims in the action and the contract contains a provision for attorney fees, section 1717 entitles the successful party to recover reasonable attorney fees incurred in the prosecution or defense of those claims. (*Hsu*, *supra*, 9 Cal.4th at p. 877.)

In contrast, plaintiffs did not achieve their litigation objective. Although the HOA recorded the assumption, that was not what plaintiffs' lawsuit sought. Both the original complaint and the FAC sought specific performance of the *amendment*. The FAC also sought a declaration that the HOA was obligated to assume all of Hovnanian's rights under the easement agreement. The trial court ruled that the assumption rendered this cause of action moot. Regardless of whether that was so, plaintiffs did not appeal from that ruling, and so it is the final adjudication of the parties' rights.

Plaintiffs contend that they are the prevailing party on the contract pursuant to section 1717 because, under the catalyst theory, the HOA "changed course as a result of the litigation" by recording the assumption. Had plaintiffs not asserted their claims in court, they argue, "nothing would have happened."

The catalyst theory permits the award of attorney fees "even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation." (*Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553, 560.) The catalyst theory " ' "saves judicial resources," [citation] by encouraging "plaintiffs to discontinue litigation after receiving through the defendant's acquiescence the remedy initially sought." ' " (*Id*. at p. 573.)

Regardless of whether the catalyst theory applies under section 1717, however, it does not extend to the situation here, where the changed behavior – the assumption – while related to the litigation, is not the primary relief plaintiffs sought in the lawsuit, namely, specific performance of the *amendment*. (*Marine Forests Society v. California Coastal Com*. (2008) 160

Cal.App.4th 867, 878; *California Public Records Research, Inc. v. City of Yolo* (2016) 4 Cal.App.5th 150, 192.)

The trial court did not abuse its discretion in ruling that the HOA was the prevailing party. We must " 'uphold a reasonable ruling even if we might not have ruled the same way and a contrary ruling would also be sustainable.' " (*DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal.5th 968, 979, italics omitted.)

III. The attorney fees award

To challenge the $20,747.50 fee award, plaintiffs contend that the declaration of Jonathan Davis supporting the attorney fees motion was not admissible. Plaintiffs argue that Davis is a "junior" associate at the firm representing the HOA, did not have personal knowledge of the matters he authenticated, and failed to establish the foundation for the supporting business records.

Junior or not, Davis is an associate who used the firm's billing practices. More important, Davis did the bulk of the work on this case, as demonstrated by the billing records attached to his declaration. Those records show that Davis researched and drafted the pleadings, including the successful demurrers, prepared the partners for telephone calls, and appeared at oral argument on the demurrers. Thus, Davis had the requisite personal knowledge.

DISPOSITION

The order is affirmed. Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.